

IN THE SUPREME COURT OF FLORIDA

DONALD PIERCE and
MICHELE PIERCE, his wife,

Petitioners,

vs.

AALL INSURANCE INCORPORATED,
a Florida corporation,

Respondent.

FILED

SID J. WHITE

JAN 5 1988

CLERK, SUPREME COURT

BY CASE NO. 71,301
Deputy Clerk

REVIEW OF THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONERS' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Areas of Disagreement with AALL's Statement of the Case and of the Facts	1
Argument:	
I	
AN INSURANCE AGENT IS NOT A PROFESSIONAL FOR PURPOSES OF THE PROFESSIONAL MALPRACTICE STATUTE OF LIMITATIONS	2
II	
IF THE PROFESSIONAL MALPRACTICE STATUTE OF LIMITATIONS IS HELD TO BE APPLICABLE IN THIS CASE, THEN THE STATUTE IS VOID FOR VAGUENESS, BOTH ON ITS FACE AND AS APPLIED	10
Conclusion	12

TABLE OF CITATIONS

Cases:	Page
<u>City of Auburndale v. Adams Packing Association,</u> 171 So. 2d 161 (Fla. 1965)	6
<u>Devco Premium Finance Co. v.</u> <u>North River Insurance Co.,</u> 450 So. 2d 1216 (Fla. 1st DCA), <u>review denied mem.,</u> 458 So. 2d 272 (Fla. 1984)	3
<u>Everett v. Gillespie,</u> 63 So. 2d 903 (Fla. 1953)	3
<u>Ex parte Amos,</u> 93 Fla. 5, 112 So. 289 (1927)	3
<u>First American Title Insurance Co. v.</u> <u>First Title Service Co. of the Florida Keys,</u> 457 So. 2d 467 (Fla. 1984)	7
<u>Florida State Racing Commission v. McLaughlin,</u> 102 So. 2d 574 (Fla. 1958)	5
<u>Panther Air Boat Corp. v. MacMillan-Buchanan</u> <u>& Kelly Insurance Agency,</u> 12 Fla. L.W. 2312 (Fla. 5th DCA Sept. 24, 1987)	5
<u>Richardson v. Doe,</u> 176 Ohio St. 370, 199 N.E.2d 878 (1964)	4
<u>Tillman v. State,</u> 471 So. 2d 32 (Fla. 1985)	10
Constitution:	
Art. V, § 3(b)(4), Fla. Const.	10
Statutes:	
Fla. Stat. § 95.11(3)(a)(1983)	9
Fla. Stat. § 95.11(4)(b)(1983)	8
Fla. Stat. § 626.041(2)(d)(1981)	6, 7

Sessions Laws:

Chapter 71-254, 1971 Fla. Laws 1372 8

Standard Jury Instructions:

Fla. Std. Jury Instr. (Civ.) 4.2(c) 7

**AREAS OF DISAGREEMENT WITH AALL'S STATEMENT
OF THE CASE AND OF THE FACTS**

Despite AALL's assertion to the contrary [AALL's Brief at 1], Mr. and Mrs. Pierce did allege in their complaint that the signature on the insurance application rejecting uninsured motorist coverage, although purported to be, was not the signature of Mr. Pierce. This allegation appears in Paragraph 5, and is realleged in Paragraph 23, of Mr. and Mrs. Pierce's Second, Third and Fourth amended complaints. [Record at 48, 51, 61, 65, 85, 89]

AALL's assertion that "the appellate court verbally indicated" that the void-for-vagueness issue had not been preserved for appeal [AALL's Brief at 1] is not supported by the record. Nor would such a verbal "indication" (whether by "the appellate court," speaking with one voice, or by a member of the panel) be accurate. As AALL admits, the void-for-vagueness issue was argued before, and considered and rejected by, the trial court. [AALL's Brief at 1][Record at 35-44, 106-07]

ARGUMENT

I

AN INSURANCE AGENT IS NOT A PROFESSIONAL FOR PURPOSES OF THE PROFESSIONAL MALPRACTICE STATUTE OF LIMITATIONS

The question before this court is whether the Florida legislature, by enacting the professional malpractice statute of limitations, intended to include insurance salesmen within the class of civil defendants protected by the statute. The professional malpractice statute of limitations expresses no such legislative intent. Nor may such legislative intent be implied.

As demonstrated by the authorities cited in the previous briefs, at the time the professional malpractice statute of limitations was enacted in 1974, the generally understood and common-law meaning of "professional malpractice" as the basis for a civil action was the professional misconduct or negligence of a member of the legal or medical professions toward a client or patient. Acknowledging that statutes will not be applied in derogation of the common law, nor held to have changed common-law principles, by implication, unless the implication is clear or is necessary to give full force to the express provisions of the statute and the public policy thus expressed, AALL relies upon three cases in asserting an expansive common-law definition of "professional malpractice." [AALL's Brief at 6-7] AALL does not, of course, go so far as to argue that the common-law definition of "professional malpractice" expressly included the negligence of insurance salesmen.

Ex parte Amos, 93 Fla. 5, 112 So. 289 (1927), the first case relied upon by AALL, was a habeas corpus proceeding involving a criminal indictment against the state comptroller for "malpractice in office," id. at 8, 112 So. at 291. In construing the criminal statute involved, this court stated that "malpractice" is a "broad term" which may mean, among other things, "professional misconduct." Id. at 17, 112 So. at 293. Everett v. Gillespie, 63 So. 2d 903 (Fla. 1953), the second case relied upon by AALL, was an appeal from the license revocation of a land surveyor charged with "malpractice, malfeasance, gross carelessness, and gross incompetence," id. at 903. In defining the four charges, this court stated that "malpractice" means, among other things, "unprofessional conduct in the handling of professional matters," and found there to be an absence of such conduct. Id. Devco Premium Finance Co. v. North River Insurance Co., 450 So. 2d 1216 (Fla. 1st DCA), review denied mem., 458 So. 2d 272 (Fla. 1984), the third case relied upon by AALL, was decided ten years after the enactment of the professional malpractice statute of limitations and, thus, offers no guidance to the common-law civil action meaning of "professional malpractice" at the time the statute of limitations was enacted in 1974.

In none of these cases did the court undertake the then irrelevant task of defining the scope of "professional" for the purposes of "professional malpractice" within the context of a civil action. Other than a handful of recent cases cited by the parties, no reported Florida civil case has so much as

alluded to a definition of "professional malpractice" encompassing anything other than the professional misconduct or negligence of a member of the legal or medical professions toward a client or patient.

Nor has AALL shown a legislative intent to alter this common meaning and common-law definition of "professional malpractice," much less a legislative intent to include insurance salesmen within this definition. AALL argues that there is no authority that the public policy behind professional malpractice statutes of limitations explained in Richardson v. Doe, 176 Ohio St. 370, 372, 199 N.E.2d 878, 880 (1964), and supported by Roscoe Pound's definition of "profession," was subscribed to by the Florida Legislature. [AALL's Brief at 7-8] However, AALL has cited no authority to the contrary, nor has AALL attempted to argue that the legislature did not subscribe to the wisdom of this public policy.

It is true, as AALL points out, that Roscoe Pound included teachers and members of the clergy in his definition of "professional." [AALL's Brief at 8] Given the historic infrequency of professional malpractice lawsuits against teachers and members of the clergy, however, it is not surprising that, as a practical matter, the common-law civil action definition of "professional malpractice" was limited to doctors and lawyers, although teachers and members of the clergy certainly were and are professionals.

AALL argues that "[t]he use by the legislature of a comprehensive term ordinarily indicates an intent to include everything

embraced within the term." [AALL's Brief at 9] In the case AALL cites for this proposition, the question was whether the comprehensive term used in a statute included just one or all three of the enumerated narrower terms used earlier in the same sentence of the statute. See Florida State Racing Commission v. McLaughlin, 102 So. 2d 574, 575, 576 (Fla. 1958). AALL has overlooked the fact that, unlike in McLaughlin, the question here is not "Which enumerated narrower terms are embraced within a broader subsequent term used in the same statute?" but simply, "What is the definition of the term?" The statute here, unlike in McLaughlin, includes no enumeration of what is embraced within the term.

AALL argues that the legislature could have limited the professional malpractice statute of limitations to lawyers and physicians by enumerating those professions. [AALL's Brief at 9] As the legislature was aware at the time the professional malpractice statute of limitations was enacted, however, the term "professional malpractice" in a civil action meant the professional misconduct or negligence of a lawyer or physician toward a client or patient. If the legislature intended to expand this common-law definition, the most obvious way to do so would have been to expressly enumerate those "professions" intended to be covered by the statute. Or the legislature could have expressly defined "professional malpractice," as the court of appeal below has now done in Panther Air Boat Corp. v. MacMillan-Buchanan & Kelly Insurance Agency, 12 Fla. L.W. 2312 (Fla. 5th

DCA Sept. 24, 1987), as "the misconduct or negligence of anyone toward a lay member of the community in the course of providing skill, counsel and judgment to the lay member of the community, for financial remuneration, when the lay member of the community, has sought and relied upon the skill, counsel and judgment."

Relying on a rambling, informal and anonymous soliloquy or colloquy (it is unclear which) of a member or members of a legislative subcommittee, AALL makes the incredible argument that the legislature intended to leave to the courts the scope of the professional malpractice statute of limitations. [AALL's Brief at 9-11] Although it would be ludicrous to conclude that the quoted soliloquy or colloquy expresses the collective intent of the legislature, any such actual intent by the legislature would be an unconstitutional delegation of legislative authority to the judiciary. See City of Auburndale v. Adams Packing Association, 171 So. 2d 161, 163 (Fla. 1965). As this court has stated, the judicial function is limited to determining what the legislature has enacted, not what the law shall be. Id. The creation of statutes of limitations is a function of the legislature, not of courts. Yet, once the common-law definition of "professional malpractice" is abandoned, as AALL argues it should be, the courts will be creating statutes of limitations, for the legislature has provided no alternative to the common-law definition of "professional malpractice."

AALL argues that, because section 626.041(2)(d), Florida Statutes (1981), prohibits anyone other than licensed insurance

agents and lawyers from counseling, advising or giving opinions regarding insurance, the legislature intended the professional malpractice statute of limitations to protect both lawyers and insurance salesmen who negligently advise a customer or client regarding an insurance matter. [AALL's Brief at 11-12] The inclusion of lawyers in section 626.041(2)(d) is simply a recognition that the laws regulating the insurance industry cannot prohibit a lawyer from giving legal advise to his client regarding insurance. The facts of the present case demonstrate the profound difference between advise given by an insurance salesman in selling an automobile liability policy and legal advise given to a client when the insuror refuses to provide coverage under the policy: AALL's salesman failed to advise Mr. Pierce regarding his statutory right to uninsured motorist coverage and Mr. Pierce's lawyer advised his client that AALL's salesman was, therefore, negligent per se.

AALL argues that Florida Standard Jury Instruction in Civil Cases 4.2(c) and First American Title Insurance Co. v. First Title Service Co. of the Florida Keys, 457 So. 2d 467 (Fla. 1984), which inspired the instruction, anticipated the involvement of "a variety of professionals in malpractice claims." [AALL's Brief at 12-14] As AALL admits in its brief, however, First American Title Insurance Co. dealt solely with the liability of title abstractors to third party plaintiffs. The professional malpractice statute of limitations, on the other hand, is relevant only when the plaintiff is in privity with the professional. Nowhere in Instruction 4.2(c) or in First American Title Insurance

Co. is "malpractice" either mentioned or implicated. Neither the case nor the instruction purport to determine when negligence constitutes "professional malpractice," they simply state the standard "reasonable lawyer," "reasonable architect," "reasonable other professional" test to be used in any negligence action involving such defendants.

Apparently making a public policy argument, AALL cites several recent cases in which "the law has already imposed upon insurance agents a high level of responsibility." [AALL's Brief at 14-17, 24] In each case the insurance salesman had been sued for negligence. None of these cases deal with or mention "professional malpractice," nor is there any indication that the professional malpractice statute of limitations, rather than the negligence statute of limitations, was the applicable statute of limitations. If AALL feels this is unfair, its protestations should be directed to the legislature, not to this court.

AALL argues that optometry appears to be covered by the professional malpractice statute of limitations. [AALL's Brief at 18] If optometry were covered by a two-year statute of limitations, such would not show an expansion of the definition of "professional malpractice." Rather, it would show an expansion of the coverage of the medical malpractice statute of limitations, whose predecessor expressly included optometric treatment. See § 95.11(4)(b)(1983); ch. 71-254, 1971 Fla. Laws 1372. Nor does the inclusion of optometry appear a likely vehicle for the inclusion of an insurance salesman.

Finally, AALL argues that the minimal educational requirements required of licensed insurance salesmen somehow justifies their inclusion within the protection of the professional malpractice statute of limitations. [AALL's Brief at 21-23] Once again, if such is the case, it is for the legislature, not the courts, to provide insurance salesmen with a two-year statute of limitations.

In applying the professional malpractice statute of limitations to the negligence of an insurance salesman, the courts below have overlooked the common-law meaning of "professional malpractice," the public policy behind professional malpractice statutes of limitations, and the history of Florida's professional malpractice statute of limitations. This is an action for negligence. It is governed by the four-year statute of limitations for negligence actions contained in section 95.11(3)(a), Florida Statutes (1983). An insurance agent is not a professional for purposes of the professional malpractice statute of limitations.

II

**IF THE PROFESSIONAL MALPRACTICE STATUTE
OF LIMITATIONS IS HELD TO BE APPLICABLE
IN THIS CASE, THEN THE STATUTE IS VOID FOR
VAGUENESS, BOTH ON ITS FACE AND AS APPLIED**

AALL seeks to avoid the void-for-vagueness issue by arguing that the issue is beyond the scope of the certified question and not properly before this court. [AALL's Brief at 24] To the contrary, as explained by this court in Tillman v. State, 471 So. 2d 32 (Fla. 1985),

The district court's certification that its decision passed upon a question of great public importance gives this Court jurisdiction, in its discretion, to review the district court's "decision." Art. V, § 3(b)(4), Fla. Const. Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and properly presented.

Tillman, 471 So. 2d at 34.

Mr. and Mrs. Pierce respectfully submit that the void-for-vagueness issue is not beyond the scope of the question certified, for the void-for-vagueness issue goes to the very heart of whether the legislature intended to include insurance salesmen within the scope of the professional malpractice statute of limitations and, as AALL has argued, the delegation of that intent to the judiciary.

Mr. and Mrs. Pierce further respectfully submit that the void-for-vagueness issue is of such importance that this court should reach the issue even if it is determined to be beyond the scope of the question certified. The issue need not be reached, of course, if this court determines that the legis-

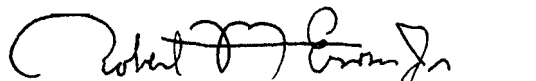
lature did not intend to alter the common-law definition of "professional malpractice."

AALL does not deny that the professional malpractice statute of limitations, if held to be applicable in this case, would be vague. Rather, AALL argues that it does not matter if the statute is vague because statutes of limitations do not prohibit or require any act. [AALL's Brief at 24] This is patently absurd. Statutes of limitations require a plaintiff to bring a lawsuit within a specified period of time or forever lose the right to do so. If the professional malpractice statute of limitations applies either to insurance salesmen, or to any defendant a court chooses to apply it to, as AALL argues, it is unconstitutionally vague and, therefore, void, because persons of common understanding and intelligence, in order to avoid the statutory bar, would have to guess at the statute's meaning.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the petitioners' initial brief on the merits, the decision of the court of appeal should be quashed, and the summary judgment of the trial court should be reversed and remanded for further proceedings consistent with the authorities cited herein.


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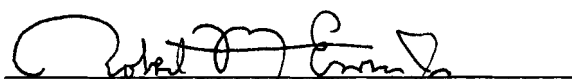
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Certificate of Service

I certify that a copy of this brief has been furnished to the following counsel of record by mail this 5th day of January 1988:

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